

This is a claim for bilateral upper extremity and neck injuries. In the September 19, 2008, Award, Judge Clark adopted the opinion of the treating physician, Dr. John P. Estivo, that claimant sustained a 16 percent whole person functional impairment. Accordingly, the Judge granted claimant benefits for a 16 percent permanent partial disability under K.S.A. 44-510e.

Respondent argues claimant had a 10 percent impairment to each upper extremity as of May 4, 2006, and that she has failed to prove she has sustained any additional impairment by August 10, 2007, which the parties stipulated was the appropriate date of accident for claimant's alleged repetitive trauma injuries. In the alternative, respondent argues claimant, at best, has sustained a five percent whole person impairment to her cervical spine. Consequently, respondent argues claimant should either receive no permanent disability benefits or the Award should be reduced.

Conversely, claimant contends her permanent disability should not be reduced due to preexisting impairment because she has sustained only one continuous series of cumulative micro-trauma injuries, which grew worse until she was given work restrictions on August 10, 2007. In addition, claimant argues that Dr. Michael H. Munhall and Dr. Estivo offer the better medical opinions and that averaging their ratings (a 36 percent whole person impairment from Dr. Munhall and a 16 percent whole person impairment from Dr. Estivo) yields a 26 percent whole person impairment.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's disability?
2. Should claimant's award be reduced under K.S.A. 44-501(c) due to a preexisting impairment?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

In her application for hearing, claimant alleged her repetitive work duties injured both her upper extremities, right shoulder, and neck. The application also indicated the date of accident was "09-10-07, the date employer gives restrictions to employee, due to the work which is the cause of the condition."¹ The parties stipulated at the regular hearing that *August 10, 2007*, was the appropriate date of accident for claimant's alleged repetitive trauma injuries.² When the stipulations were taken, nothing was mentioned regarding preexisting functional impairment or reducing claimant's award under K.S.A. 44-501(c) due to any alleged preexisting impairment.

¹ Form K-WC E-1, Application for Hearing (filed Sept. 20, 2007).

² R.H. Trans. at 3.

Claimant testified she injured her wrists, right elbow, and neck by the work she performed for respondent as a sealer. Respondent does not challenge that claimant's alleged injuries arose out of and in the course of her employment with respondent.³

On August 10, 2007, claimant reported her injuries to respondent's medical station. Claimant was given work restrictions, which respondent accommodated. In addition, respondent referred claimant to Dr. John P. Estivo, who eventually performed carpal tunnel release surgery on both of claimant's wrists. Despite those surgeries, claimant continues to experience symptoms in her hands. She testified, in part:

In my right hand, I am still having numbness and tingling; and where the thumb is, the pain moderates up there, and sometimes it is real stiff to move. The left hand, I am just having the numbness and tingling in it; and the elbow, I can't extend it for a long period of time because when I do, it pulls the muscle and the pain is still there and it moderates up to the shoulder. The neck area is still painful, the burning sensation there and stiff with activity. It moderates down, you know, that full muscle. It is still the same as it was.⁴

Claimant believes the surgery made her right hand a little better. But the left hand is a different story. Dr. Estivo allegedly told claimant it would take approximately one year before she would see good progress in that hand.

Before working for respondent, claimant worked for Boeing. Claimant has worked for respondent and Boeing for a combined period of 11 years. The record is not entirely clear but it appears claimant worked as a sealer for most, if not all, of those years. Claimant believed her employer changed from Boeing to respondent in 2005.

Dr. Estivo released claimant in January 2008 and claimant has resumed her job with respondent as a sealer. According to claimant, the doctor advised her to avoid or limit overhead work.

One of the principal issues in this claim is whether claimant had a preexisting functional impairment to her upper extremities that should reduce her award under K.S.A. 44-501(c). The evidence establishes that in early 2006 claimant sought treatment from her personal physician, Dr. Alan J. Fearey, for numbness in her hands. In a March 7, 2006, office note Dr. Fearey recorded that claimant complained of some tingling in her upper extremities but her Tinel and Phalen signs were both negative. That same note also indicated claimant had some tenderness to palpation at the *left* elbow.

³ *Id.*

⁴ *Id.* at 7, 8.

Dr. Fearey sent claimant for nerve conduction tests, which indicated she had mild bilateral carpal tunnel syndrome and low normal ulnar velocities across the *right* elbow. Those tests were conducted by Dr. Burtram J. Odenheimer on May 4, 2006. On May 15, 2006, after Dr. Fearey had received the results from the nerve conduction tests, he wrote claimant, as follows:

This is a letter regarding your nerve conduction study that was obtained on May 4, 2006. The nerve conduction study shows mild bilateral carpal tunnel syndrome with maybe some slight slowing of the ulnar nerve; the nerve which supplies the fourth and fifth digits on the right side. I would recommend that you use anti-inflammatory agents such as Aleve or Advil to decrease the inflammation at the carpal tunnel area. In addition, I would recommend that you continue B6 at 100 mg twice a day to allow the nerves [to] work more efficiently. In addition, cock-up splints will take the pressure off the nerves.

If you need some cock-up splints, please call my office . . . and we will get that set up for you. If you continue to have symptoms, the next step would be to have you see one of our orthopedic specialists.⁵

Although claimant's doctor advised her to report her complaints to her employer as it was a workers compensation matter, claimant did not because she was afraid she would lose her job. Instead, she continued working without seeking additional medical treatment. The symptoms in her hands, right elbow, and neck worsened. And on August 10, 2007, claimant first notified respondent of her symptoms.

In addition to the surgery Dr. Estivo performed on claimant's wrists, the doctor also injected her right elbow. When the benefits from the injection dissipated, claimant returned to the doctor but was denied further treatment for lack of authorization. Physical therapy was the only treatment claimant received for her neck complaints.

The nature and extent of claimant's injury and disability

Claimant's medical expert witness, Dr. Michael H. Munhall, is board-certified in physical medicine and rehabilitation, holistic medicine, and pain management. The doctor, who examined claimant in February 2008, performed nerve conduction tests on claimant and found evidence of a chronic right C5 (fifth cervical vertebra) radiculopathy and evidence of persistent postoperative moderate bilateral carpal tunnel syndrome.

Based upon his examination and tests, Dr. Munhall diagnosed (1) cervical derangement syndrome with right C5 chronic radiculopathy, (2) bilateral moderate carpal

⁵ Stipulation to Medical Records (filed July 16, 2008).

tunnel syndrome, and (3) right lateral epicondylitis. Using the *AMA Guides*,⁶ the doctor rated claimant as having a 15 percent whole person impairment for the cervical derangement and radiculopathy, 20 percent impairment to each upper extremity for moderate carpal tunnel syndrome, and four percent impairment to the right upper extremity for the lateral epicondylitis. Those ratings combined for a 36 percent whole person impairment for the repetitive trauma injuries the doctor believed claimant sustained while working for respondent.

Dr. Munhall agreed that claimant's May 2006 nerve studies indicated she had a 10 percent impairment to each upper extremity at that time. Accordingly, the doctor testified claimant sustained an additional 11 percent impairment to each upper extremity as she continued to work for respondent after May 2006.⁷ And if the alleged preexisting impairment for the bilateral carpal tunnel syndrome was deducted from claimant's present impairment, the doctor testified claimant had a 24 percent whole person impairment using straight math or a 28 percent whole person impairment using the combined values chart of the *AMA Guides*.⁸

When asked about claimant's cervical spine, Dr. Munhall indicated he believed claimant had neural foraminal stenosis affecting the C5 nerve root. The doctor testified, in part:

She had a good history for neck pain that went to the right shoulder blade, she had a correlating examination, I could provoke neck and right scapular spine pain, and she had a positive EM[G], that's the golden triad.⁹

Respondent hired Dr. Paul S. Stein to evaluate claimant for purposes of this claim. The doctor, who is board-certified in neurosurgery, examined claimant in July 2008 and rated claimant under the *Guides* as having a five percent whole person impairment due to her cervical spine. Dr. Stein determined claimant had an excellent result from her carpal tunnel release surgeries and, therefore, she did not incur any functional impairment to her upper extremities from the bilateral carpal tunnel syndrome. The doctor testified, in part:

Ms. Norris stated that she had no median nerve distribution symptoms at this time. Her grip strength was okay. Her sensory examination was within normal limits, and

⁶ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁷ Munhall Depo. at 28.

⁸ *Id.* at 44.

⁹ *Id.* at 39.

so by either criteria I did not find evidence of impairment for carpal tunnel. The surgery itself, the Guides do not give you impairment for having the little incision at the wrist, and in the carpal tunnel cut, there's no impairment for that.¹⁰

But Dr. Stein did acknowledge on cross-examination that some doctors might rate claimant as having a five percent impairment to the left upper extremity for intermittent symptoms she stated she was having involving her left thumb.

In addition, Dr. Stein testified that in 2006 claimant had bilateral carpal tunnel syndrome symptoms that were documented by electrical activity and that he "would have assigned her a mild category 10 percent impairment" if he had examined her at that time and she had elected to forego additional treatment.¹¹

Dr. Stein could not say claimant had any impairment to her elbow without a new nerve conduction test. And the doctor did not find claimant's elbow symptoms severe enough to merit an impairment rating. Dr. Stein disagreed with how Dr. Munhall rated claimant's elbow (four percent impairment to the right upper extremity for lateral epicondylitis) by using tables from the *Guides* that dealt with joint crepitus as claimant's elbow injury does not entail the joint. Dr. Stein acknowledged, however, that the *Guides* does not specifically provide any impairment for epicondylitis.

On the other hand, as indicated earlier Dr. Stein did find that claimant had a five percent whole person impairment under the *Guides*' Diagnosis-Related Estimates Cervicothoracic Category II for her neck complaints. The doctor testified that claimant did not have findings of cervical radiculopathy during his examination. Further, Dr. Stein indicated that Dr. Munhall's EMG results were not indicative of radiculopathy under the criteria set by the *Guides*.

Respondent also presented the testimony of Dr. John P. Estivo, who is board-certified in orthopedic surgery. The doctor began treating claimant in September 2007 and performed bilateral carpal tunnel release surgeries on claimant after initial nerve conduction tests indicated that claimant had moderate carpal tunnel syndrome on the right and mild to moderate carpal tunnel syndrome on the left. The EMG did not show any abnormalities in claimant's neck.

Dr. Estivo operated on claimant's right wrist in early October 2007 and the next month operated on her left wrist. The doctor released claimant from medical treatment in January 2008 and rated her as having a 10 percent impairment in each upper extremity

¹⁰ Stein Depo. at 12, 13.

¹¹ *Id.* at 13, 14.

from her carpal tunnel problems but at that time the doctor found no impairment in either her right elbow or neck. In June 2008 claimant returned to the doctor for treatment of her elbow and neck pain. Dr. Estivo injected claimant's right elbow, which provided relief. The doctor also concluded claimant was suffering from a cervical spine strain, which the doctor believed comprised a five percent whole person functional impairment. Accordingly, the doctor rated claimant as having a 16 percent whole person impairment under the *AMA Guides*.

Dr. Estivo also testified that claimant would have a 10 percent impairment to each upper extremity due to bilateral carpal tunnel syndrome in May 2006 based upon her nerve conduction studies from that period.

Considering the various medical opinions the Board affirms the Judge's finding that claimant has sustained a 16 percent whole person functional impairment due to the injuries she sustained while working for respondent. The Board finds the evidence establishes that claimant presently has mild residual symptoms from carpal tunnel syndrome that comprise a 10 percent impairment to each upper extremity as measured by the *AMA Guides*. Likewise, the Board finds claimant has a cervical strain that comprises a five percent whole person functional impairment under the *Guides*. Combining those functional impairments yields a 16 percent whole person impairment.

The Board also finds the greater weight of the evidence establishes that claimant had bilateral carpal tunnel syndrome in May 2006 that comprised a 10 percent impairment to each upper extremity as measured by the *AMA Guides*.

CONCLUSIONS OF LAW

Because claimant has established injuries to both upper extremities, there is a presumption that she is permanently and totally disabled.¹² But that presumption is overcome as claimant has returned to work for respondent and she is, therefore, engaged in substantial and gainful employment. And because claimant has a neck injury, which does not fall within the schedule of K.S.A. 44-510d, the calculation of claimant's permanent disability benefits is governed by K.S.A. 44-510e, which provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning

¹² *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, rev. denied ___ Kan. ___ (2007).

after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

And when a worker sustains both a scheduled injury as identified by K.S.A. 44-510d and an unscheduled injury, the Kansas Supreme Court has stated that the worker's compensation is determined under K.S.A. 44-510e.

K.S.A. 44-510d contains the schedule for compensation for certain permanent partial disabilities. . . . K.S.A. 44-510e covers compensation for permanent partial general disabilities, and thus covers those not included in the 44-510d schedule. If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.¹³

As indicated above, claimant continues to work for respondent as a sealer. Claimant does not seek a work disability¹⁴ in this claim and presumably that is because claimant continues to earn a wage that is at least 90 percent of her preinjury wage. Accordingly, claimant's permanent partial disability under K.S.A. 44-510e is 16 percent, which corresponds to her whole person impairment rating.

Respondent argues that under K.S.A. 44-501(c) claimant's award should be reduced due to her bilateral carpal tunnel condition, which was rateable under the AMA *Guides* as early as May 2006. K.S.A. 44-501(c) provides:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

¹³ *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

¹⁴ A permanent partial disability greater than the functional impairment.

Throughout the litigation of this claim, claimant has maintained that the series of traumas that caused her injuries comprised, or should be viewed as, only one accident. Conversely, respondent argues that claimant's series of repetitive traumas should be viewed as comprising at least two accidents, with claimant having a preexisting 10 percent impairment to each upper extremity. Respondent asserts it closes its plant for two weeks during the Christmas holiday and, therefore, there is a break in the series of traumas and claimant's period of accidental injury.

The Board disagrees. The Board finds that claimant has sustained only one series of traumas and, therefore, there should be no reduction in claimant's award for preexisting impairment. The legislature has recognized the difficulty in determining the appropriate accident date for repetitive trauma injuries, which may occur over extended periods of time and, therefore, the legislature enacted K.S.A. 2007 Supp. 44-508(d), which states:

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the **authorized physician takes the employee off work** due to the condition **or restricts** the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the **employee gives written notice** to the employer of the injury; or (2) the date the condition is **diagnosed as work related, provided such fact is communicated in writing to the injured worker**. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.¹⁵

The parties stipulated the appropriate date of accident for claimant's repetitive trauma injuries was August 10, 2007. The facts do not establish that there was any other accident date considering the criteria of K.S.A. 2007 Supp. 44-508(d). More specifically, the record fails to establish that any of the criteria of that statute was met by reason of the limited medical treatment claimant received from her personal physician in early 2006.

¹⁵ K.S.A. 2007 Supp. 44-508(d) (emphasis added).

Although claimant was advised in 2006 that her symptoms were related to her work, there is no evidence that fact was communicated to her in writing.

In addition, the parties stipulated to an ending date for the series without mentioning any need to agree on a beginning date nor making that an issue for the Judge to decide.

Aside from K.S.A. 2007 Supp. 44-508(d), the Board finds no compelling reason to divide into multiple accidents the series of micro-traumas that claimant sustained to her hands while working for respondent. Instead, deference should be given to the last sentence of K.S.A. 2007 Supp. 44-508(d): *Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.*

In short, claimant sustained injuries and aggravations to her upper extremities and neck due to the repetitive trauma she sustained while working for respondent. Claimant is entitled to receive disability benefits for a 16 percent whole person functional impairment. And there should be no reduction of the award under K.S.A. 44-501(c) for preexisting impairment.

AWARD

WHEREFORE, the Board modifies¹⁶ the September 19, 2008, Award entered by Judge Clark.

Shirley D. Norris is granted compensation from Spirit Aerosystems, Inc., and its insurance carrier for an August 10, 2007, accident and resulting disability. Ms. Norris is entitled to receive one day of temporary total disability benefits at \$510 per week, or \$71.40, plus 66.40 weeks of permanent partial general disability benefits at \$510 per week, or \$33,864, for a 16 percent permanent partial general disability, making a total award of \$33,935.40, which is all due and owing less any amounts previously paid.

The record does not contain a written contract of employment between the claimant and her attorney. A reasonable claimant attorney fee shall be awarded in accordance with K.S.A. 44-536 upon presentation of the claimant's attorney's written contract of employment and subject to approval of such contract by the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

¹⁶ The Board modifies the September 19, 2008, Award to include in the award of benefits the temporary total disability benefits paid to claimant.

IT IS SO ORDERED.

Dated this ____ day of January, 2009.

BOARD MEMBER

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DISSENT

The majority awards claimant a 16 percent permanent partial disability to the body as a whole for her injuries. The Kansas Supreme Court in *Casco*¹⁷ emphasized that scheduled injuries are the general rule and nonscheduled injuries are the exception. Accordingly, if an injured body part is on the schedule in K.S.A. 44-510d, then the compensation for that injury must be calculated pursuant to that schedule. The claimant's forearms are on the schedule.¹⁸ Therefore, any portion of the permanent partial disability awarded by the majority that corresponds to the permanent impairment ratings for the forearms must be calculated pursuant to K.S.A. 44-510d(a)(12). The neck is not contained within the schedules of K.S.A. 44-510d. An injury to the neck is an unscheduled injury. Accordingly, the portion of the 16 percent permanent partial disability award that corresponds to the neck injury should be calculated pursuant to K.S.A. 44-510e.

Nowhere does K.S.A. 44-510d say that scheduled injuries that occur simultaneously with nonscheduled injuries should be compensated as general body disabilities under K.S.A. 44-510e. By combining the impairment ratings for claimant's scheduled injuries to her forearms with the rating for her unscheduled injury to her neck, the majority is reading something into K.S.A. 44-510d that is not in the statute. *Casco* requires that combinations of scheduled injuries be compensated separately regardless of whether the injuries

¹⁷ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 7, 10, 154 P.3d 494, rev. denied ____ Kan. ____ (2007).

¹⁸ K.S.A. 44-510d(a)(12).

occurred separately, simultaneously, or as a result of a natural progression. Likewise, K.S.A. 44-510d and K.S.A. 44-510e should be applied separately, such that combinations of scheduled and nonscheduled injuries should be compensated separately.

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge